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No. 82-72

In the Supreme Court of the United States

OCTOBER TERM, 1982

TILDEN R. WILKINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's tort claim arising out of a motor vehicle accident accrued under the Federal Tort Claims Act at the time of his injury, when he knew that the driver who struck him was an employee of the United States Navy, or later, when he discovered that the driver was acting within the scope of his federal employment at the time of the accident.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-42) is reported at 677 F.2d 998. The opinion of the district court (Pet. App. A-43 to A-61) is reported at 523 F. Supp. 372.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-62 to A-63) was entered on April 27, 1982. The petition for a writ of certiorari was filed on July 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 3, 1978, petitioner was struck by a van driven by Richard Gray, a first-class boatswain's mate in the United States Navy. Gray was stationed aboard the U.S.S. MILLER, which was then undergoing repairs in Boston, Massachusetts. Pursuant to orders from his commanding officer, Gray drove the van, which the Navy had leased from Econo Car of Boston, to Norfolk, Virginia, to pick up and deliver spare parts and the ship's mail. The accident occurred while Gray was returning to his hotel after delivering the mail. Pet. App. A-2 to A-3.

Gray promptly notified his commanding officer and Econo Car of the accident. Shortly thereafter, counsel for Econo Car interviewed Gray in connection with petitioner's claim for damages for injuries allegedly sustained in the accident. Petitioner also had promptly retained counsel, who discussed the accident with Econo Car's counsel. Although petitioner knew at the time of the accident that Gray was employed by the Navy, petitioner's counsel failed to explore with counsel for Econo Car the possibility that Gray had been operating the van in the course of his federal employment. Pet. App. A-3 to A-4, A-10 to A-11.

On September 16, 1980, petitioner filed suit against Gray in the Circuit Court of the City of Virginia Beach. Gray's answer, filed October 10, 1980, asserted that the accident had occurred while he was acting within the scope of his employment with the Navy and sought dismissal based on the Federal Drivers Act, 28 U.S.C. 2679(b).[1] Gray's answer also

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[1] 28 U.S.C. 2679(b) provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the

pointed out that petitioner's failure to present his tort claim in writing to the appropriate federal agency within two years of its accrual forever barred the claim. 28 U.S.C. 2401(b), 2675(a).[2] Pet App. A-4 to A-6. Petitioner subsequently filed an administrative claim with the Navy on October 24, 1980 (*id.* at A-25).

In April 1981, upon the certification of the United States Attorney that Gray had been acting in the scope of his employment when the accident occurred, the case was removed to the United States District Court for the Eastern District of Virginia and the United States was substituted as the party defendant

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operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

[2] 28 U.S.C. 2401(b) provides:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. 2675(a) provides in part:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency * * *.

(Pet. App. A-6, A-43 to A-44).[3] The district court granted summary judgment in favor of the United States, holding that Gray had been acting within the scope of his employment under the applicable Virginia law and that petitioner had not filed a timely administrative claim (*id.* at A-46 to A-61). The court found no basis to hold that the time for filing an administrative claim did not run from the date of the accident, since at that time petitioner "knew all the essential facts of the case except the fact that the government was vicariously liable under the Federal Tort Claims Act." *Id.* at A-60, quoting *Wollman* v. *Gross*, 484 F. Supp. 598, 604 (D.S.D.), aff'd, 637 F.2d 544 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981).

The court of appeals affirmed (Pet. App. A-1 to A-42). The court concluded that it was "inescapable * * * that Gray was acting in the scope of his employment" (*id.* at A-7) and that petitioner's unawareness of this fact could not be excused as attributable to any act or omission of the government (*id.* at A-10 to A-15). Rather, the court observed (*id.* at A-15), "as between [the United States] and Wilkinson, the latter, or, more realistically, his counsel,

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[3] 28 U.S.C. 2679(d) provides:

> Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. * * *

brought about the consequences resulting from counsel's inaction." The court stressed that "the Government has not behaved in any unfair way" (*id.* at A-15) and that there was no evidence that "Government counsel had any knowledge whatever of the proceedings until well after the two years available to the [petitioner] to meet a necessary precondition to suit had fully expired" (*id.* at A-14).

Judge Butzner dissented (Pet. App. A-24 to A-42). In his view, petitioner's claim did not "accrue" within the meaning of 28 U.S.C. 2401(b) until "he or his attorney knew, or in the exercise of reasonable care should have known, that his injury was caused by a government employee acting within the scope of his employment" (Pet. App. A-31). In reaching this result, Judge Butzner relied on *United States* v. *Kubrick*, 444 U.S. 111 (1979), reasoning that the Court there accepted as the time of "accrual" the date the plaintiff possesses " 'the critical facts that he has been hurt and who has inflicted the injury' " (Pet. App. A-37, quoting *United States* v. *Kubrick*, *supra*, 444 U.S. at 122). Judge Butzner suggested that, in the employment context, the concept of "who has inflicted the injury" should include not only the identity of the individual as a government employee, but also the fact that that government employee was acting within the scope of his employment (Pet. App. A-37).

The majority rejected Judge Butzner's views on the grounds that the argument had not been made in either the district court or the court of appeals and that it was unsupported by case authority (Pet. App. A-18 to A-21). Moreover, the majority noted that *Kubrick*'s reference to the "need to know who has inflicted the injury in order to trigger accrual" was inapposite here since both the existence of the injury

and Gray's identity as a Navy employee on active service were known to petitioner from the outset (*id.* at A-22 to A-23). Petitioner thus "was possessed of sufficient knowledge to put him on inquiry as to whether Gray, a naval rating on active service, was operating within the scope of his employment" (*id.* at A-22).

ARGUMENT

1. Petitioner asserts (Pet. 12) that *United States* v. *Kubrick*, 444 U.S. 111 (1979), provides "authoritative precedent" for reversal of the court of appeals' decision. To the contrary, *Kubrick* squarely supports the decision below. As this Court noted in *Kubrick*, as a general rule a claim under the Federal Tort Claims Act "accrues at the time of the plaintiff's injury." *Id.* at 120. A number of courts have concluded, however, that in medical malpractice cases, where the injury may not manifest itself until long after it has been inflicted, the claim may be deemed to accrue only later, when the victim has discovered both the injury and its cause (*id.* at 120-121 & n.7). The court of appeals in *Kubrick* had gone one step further and held that the plaintiff's medical malpractice claim did not accrue until the plaintiff not only was aware of his injury and its cause, but also had reason to suspect that the doctor who caused the injury was legally blameworthy (*id.* at 121). This Court reversed, rejecting the notion that Congress intended the accrual of a claim under the Federal Tort Claims Act to be postponed until the victim knows not only the facts of his injury and its cause, but also the legal significance of those facts (*id.* at 122-123; emphasis added):

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal

> rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, *and he need only ask.*
>
> * * * * *
>
> To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government.

In our view, this motor vehicle accident case is governed not by the special rule that has been designed for medical malpractice cases—that a claim does not accrue until the claimant has discovered both his injury and its cause—but rather by the general rule that a claim under the Federal Tort Claims Act "accrues at the time of the plaintiff's injury" (*United States* v. *Kubrick*, *supra*, 444 U.S. at 120).[4] Even assuming that the malpractice "discovery" rule applies in cases turning on the employment status of the federal tortfeasor, however, this case was prop-

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[4] See *West* v. *United States*, 592 F.2d 487, 492-493 (8th Cir. 1979); *Dunaville* v. *Carnago*, 485 F. Supp. 545, 548 (S.D. Ohio 1980); *Lien* v. *Beekner*, 453 F. Supp. 604 (N.D.N.Y. 1978). In these cases the courts did not apply the malpractice "accrual" concept so as to defer accrual until the plaintiff became aware of the defendant's status as a federal employee.

erly dismissed as time-barred because petitioner knew from the outset that his injury had been inflicted by a rating in the naval service, and he thus was possessed of sufficient facts to inquire whether Gray was acting within the scope of his employment. To excuse petitioner from doing so by postponing the accrual of his claim until he had such additional knowledge would be contrary to this Court's admonition in *Kubrick* (444 U.S. at 123) that statutes of limitations, which are an important condition on the government's waiver of sovereign immunity, should be strictly observed in accordance with the intent of Congress. See *Wollman* v. *Gross*, 637 F.2d 544, 547-549 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981); *Miller* v. *United States*, 418 F. Supp. 373, 377 (D. Minn. 1976).[5]

2. There is no conflict among the courts of appeals on the "accrual" issue—the sole issue that petitioner presents for this Court's review (Pet. 2-3). Nevertheless, petitioner contends (Pet. 9-10), relying on *Kelley* v. *United States*, 568 F.2d 259 (2d Cir.), cert. denied, 439 U.S. 830 (1978), and *Henderson* v. *United States*, 429 F.2d 588 (10th Cir. 1970), that the result below would have been different—*i.e.*, his action would not have been dismissed—had it arisen in the Second or Tenth Circuits. In *Kelley*, the Second Circuit held that the filing of suit against a federal employee-driver in state court within two years of the accident precluded dismissal of a tort claim against the United States for failure to satisfy the administrative claim requirement of 28 U.S.C. 2401(b). The court reasoned that the state court

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[5] We also note, as did the court of appeals (Pet. App. A-18), that petitioner did not present his "accrual" argument to the courts below.

suit against the federal employee functions as an equivalent form of notice to the federal government (568 F.2d at 264-266). In *Henderson*, the Tenth Circuit held that the United States became a party as a matter of law when an action was filed against a federal employee-driver in state court and that the filing of the state court action tolled the Federal Tort Claims Act statute of limitations (429 F.2d at 590). See also *Harris* v. *Burris Chemical, Inc.*, 490 F. Supp. 968 (N.D. Ga. 1980); *Whistler* v. *United States*, 252 F. Supp. 913 (N.D. Ind. 1966).[6]

As we indicated in our petition for a writ of certiorari in *Kelley* (No. 77-1729, 1978 Term), we believe the foregoing cases were wrongly decided, since it is settled that the filing of an administrative claim with the appropriate federal agency is a jurisdictional prerequisite to any tort action against the United States. See, *e.g.*, *House* v. *Mine Safety Appliances Co.*, 573 F.2d 609, 614 (9th Cir.), cert. denied, 439 U.S. 862 (1978); *Lunsford* v. *United States*, 570 F.2d 221, 224 (8th Cir. 1977); *Kielwien* v. *United States*, 540 F.2d 676, 679 (4th Cir.), cert. denied, 429 U.S. 979 (1976); *Best Bearings Co.* v. *United States*, 463 F.2d 1177, 1179 (7th Cir. 1972); *Bialo-*

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[6] *McGowan* v. *Williams*, 623 F.2d 1239 (7th Cir. 1980), on which petitioner also relies (Pet. 10-11), is inapposite. There the plaintiff, within six months of the denial of his timely administrative claim, mistakenly brought suit against the driver in state court rather than against the United States in federal court. The court of appeals reversed the district court's dismissal of the action, holding that there had been sufficient compliance with the requirements of Sections 2675 (a) and 2401(b). The Seventh Circuit's decision, even if correct, does not avail petitioner, because his administrative claim was not timely filed.

was v. *United States*, 443 F.2d 1047, 1049 (3d Cir. 1971). Thus, in our view, the correct approach is the one adopted by the Eighth Circuit in *Meeker* v. *United States*, 435 F.2d 1219 (1970)—that the requirement that an administrative claim be filed within two years of the accident cannot be circumvented in Federal Drivers Act cases by the filing of a state court suit against the employee-driver.

But this is not an appropriate case in which to resolve the conflict between those cases. The court of appeals here did not squarely decide the question whether an accident victim's filing suit in state court within two years of the accident is an adequate substitute for a timely administrative claim. Rather, the court below viewed *Kelley* as permitting such substitution only where the government "lull[s]" the plaintiff "into a false sense of security" (Pet. App. A-10) by deferring its motion for removal to federal court until the time for filing an administrative claim has expired. Because, the court of appeals held (*id.* at A-10 to A-13), no such lulling had occurred here, there was no basis for excusing petitioner's failure to file a timely administrative claim.

Moreover, as noted above (page 8, *supra*), petitioner does not seek this Court's review of the question whether a state court suit against the employee-driver filed within two years of the accident is an adequate substitute for a timely administrative claim. The only question presented in the petition (Pet. 2-3) is the accrual issue, on which the circuits are not divided.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1982

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